IN THE HIGH COURT OF PUNJAB AND HARYANA AT

CHANDIGARH.

Criminal Appeal No.575-SB of 1995
Date of decision: 03.04. 2007

Baldeep Singh.

-----Appellant.

Vs.

U.T., Chandigarh.

-----Respondent.

CORAM:- HON'BLE MR JUSTICE ADARSH KUMAR GOEL

Present: Mr. Bipan Ghai, Advocate
for the appellant.

Mr. Rajiv Sharma, Advocate
for Union Territory, Chandigarh.

The appellant questions his conviction under Section 363, 366 and 376 IPC. He stands sentenced as under:-

(i) Under Section 363 IPC, to undergo RI for 4 years and to pay fine of Rs.1,000/- or in default, to undergo further RI for two months.

(ii) Under Section 366 IPC, to undergo RI for 6 years and to pay fine of Rs.1,000/- or in default, to undergo further RI for two months.

(iii) Under Section 376 IPC, to undergo RI for 8 years and to pay fine of Rs.5,000/- or in default, to undergo further RI for six months.

All these substantive sentences are to run concurrently.

Case of the prosecution is that 'M' (PW-11) had gone to General Hospital on 16.08.1993 at 9 A.M. alongwith her sister Govindi for taking medicines for her toothache. Govindi came back home without 'M' as 'M' was nowhere to be found. During search, it was found that the accused who was neighbour of the accused, was also missing from his home since the same day. PW-12 father of 'M' suspected the accused to have kidnapped 'M' and he lodged a 'missing' report vide DDR No.51 dated 16.08.1993 at 10 P.M. His statement was recorded on 18.8.1993 that the accused had kidnapped 'M'. On the basis of this statement (Exh.PR), FIR was registered under Section 363/366 IPC. PW-18 ASI Nirmal Singh conducted investigation and on 21.08.1993, he alongwith SI Baldev Singh (PW-16), lady Constable Kulwant Kaur (PW-15), C. Karam Singh (PW-14) and C. Sudesh Kumar was present in the market of Sector 16 where Umed Singh also met him. Then he went to Sector 15 market and he received information that the accused alongwith 'M' was standing near the local bus-stop, Sector 15. They then proceeded to the bus stop and recovered 'M' alongwith the accused on identification by Umed Singh. 'M' led the police party to Sector 25 hut, where the accused had committed rape on her. Her statement was recorded and she was medically examined by Dr. Harinder Kaur (PW-1). The accused was medically examined by Dr. M.P. Singh (PW-2).

PW-1 Dr. Harinder Kaur examined 'M' and found:-

"....On examination she had Breast well developed. Axillary and pubic hair well developed. No marks of injury

anywhere on the body. Height 61" weight 45 kgs. Teeth 14 upper jaw and 13 lower jaw. Menarche 14 years. LMP bleeding at present and prior to that LMP was 1.7.1993.

Local Examination:- Pubic hairs well developed. No marks of violence on vulva or thighs.

Hymen torn, old healed tear was present at 6 O'clock position.

P/s shows bleeding through the Cx OS present.

P/V Introitus admits two fingers easily upwords uterus retroverted normal size mobile with clear fornices."

PW-2 Dr. M.P. Singh found that the accused was capable of performing sexual intercourse.

After completing investigation, the accused was challaned.

The prosecution in support of its case, examined Dr. Harinder Kaur, Medical Officer (PW-1), Dr. M.P. Singh, Medical Officer (PW-2), Head Constable Charanjit Singh (PW-3) regarding daily diary report, Mrs. Dalbir Kaur (PW-4) regarding birth certificate, Anand Sharma (PW-5) regarding affidavit Exh.PH, Jaswant Singh, Head Draftsman (PW-6), Constable Manoj Kumar (PW-7) regarding affidavit Exh.PM, Constable Mohan Singh (PW-8) regarding affidavit Exh.PN), Mrs. Harveen P. Kaushal (PW-9) regarding birth certificate, SI Mewa Singh (PW-10) regarding FIR Exh.PR/1, Ms. Maya Kumari Nagi, prosecutrix (PW-11), Umed Singh, Complainant (PW-12), Shiv Charan (PW-13) regarding recovery witness, Constable Karam Singh (PW-14) regarding MLR Exh.PD, Lady Constable Kulwant Kaur (PW-15) regarding MLR Exh.PB), SI Baldev Singh, Investigating Officer (PW-

16) and ASI Nirmal Singh, Investigating Officer (PW-18) (wrongly mentioned as PW-18, otherwise he is PW-17).

The accused denied the prosecution allegations and stated that he was falsely implicated, on account of grudge of the father of the prosecutrix, due to his official dispute with the father of the accused, who was also working in the same department.

'M' appearing as PW-11, deposed that she had gone to the hospital with her elder sister and when her sister went to bring medicines from the chemist shop, the accused met her and told her that her mother had called her immediately to her residence. He was her neighbour. She believed him and went on his cycle. He took her to a hut in Sector 25. She protested, but he said that he will carry her to her house in a short time. Thereafter, the accused raped her. He also raped her repeatedly during the period from 16.08.1993 to 21.8.1993 after giving a threat that he will finish her with knife, if she protested. The accused had taken her to the local bus stop on 21.8.1993 and the police recovered her. In cross-examination, she deposed that she raised noise and cries when she was forcibly taken by the accused in the reverse side instead of taking her to her residence, but the accused said that he will take her to her residence after visit to Sector 25, where he had some work. She also raised noise in the hut. The accused used to bring meal from outside and used to lock her when he had to go out of the hut. She remained within the hut and did not even take bath. She used to go out for answering the call of nature in the night alongwith the accused. She

was not raising noise at the bus stop on account of threat of the accused.

After considering the evidence on record, the trial Court held the case of the prosecution to be fully proved beyond reasonable doubt and convicted and sentenced the accused.

The trial Court held the date of birth of 'M' to be 21.10.1976, as per school admission form (Exh.P1) supported by affidavit (Exh.PH) of her father. PW-9 Harveen Kaushal, teacher of the school proved the school leaving certificate. As per certificate (Exh.P5), issued by the Gram Sabha, entry of her birth was dated 20.10.1976. She was, thus, minor on the date of offence, though she was above the age of 16 years.

The trial Court observed that the accused having deceitfully taken away 'M' with him, committed the offence under Section 366 IPC. He was further proved to have committed rape without the consent of 'M' in spite of her protest. In view of threat which was given to her, her not raising alarm, did not imply her consent.

I have heard learned counsel for the parties and perused the record.

Contention raised on behalf of the appellant is that no offence was made out. The prosecutrix is alleged to have been kidnapped in the broad day-light from a public place, which could not be believed unless she was a consenting party. She could have raised alarm or told the police people on the road. She had opportunity to escape when she was in the hut for five days. Even at

the bus stop, from where she was apprehended, she had not raised any alarm. She being above the age of 16 years, offence under Section 376 IPC was not made out. Offence under Section 363 and 366 IPC was not made out, she being a willing party. She could not be said to have taken away from the guardian. Reliance has been placed on judgment of the Hon'ble Supreme Court in ***S. Varadarajan v. State of Madras*** AIR 1965 SC 942 and judgments of this Court in ***Narinder v. State of Haryana*** 2003(3) RCR (Criminal) 721 and ***Rajesh v. State of Haryana*** 2005(2) RCR (Criminal) 931.

Learned counsel for the State supported that conviction and sentence of the appellant.

The question to be determined is whether the accused took or enticed the minor out of keeping of lawful guardian or whether victim voluntarily went with the accused.

The next question is whether the accused committed the offence of rape.

It may be observed that date of birth of the victim has not been disputed by learned counsel for the appellant. Even otherwise, from the record, the date of birth stands proved. The victim was clearly below the age of 18 years though above the age of 16 years. As such, she was minor.

The offence under Section 363 IPC comprises of taking or enticing of a minor out of keeping of the lawful guardian without the consent of the guardian. Consent of the minor is immaterial. The offence may be committed even when the minor's consent is brought up by persuasion of the accused. This issue has been examined by

the Hon'ble Supreme Court inter-alia in ***S. Varadarajan v. State of Madras*** AIR 1965 SC 942, ***State of Haryana v. Raja Ram*** AIR 1973 SC 819 and ***Thakorlal D. Vadgama v. The State of Gujarat*** AIR 1973 SC 2313.

In ***S. Varadarajan,*** the Hon'ble Supreme Court observed that there is distinction between taking and allowing a minor to accompany. Relevant observations of the Hon'ble Supreme Court are as under:-

> "**7.** ....It will thus be seen that taking or enticing away a minor out of the keeping of a lawful guardian is an essential ingredient of the offence of kidnapping. …
>
> ….On the other hand the evidence of the girl leaves no doubt that the insistence of marriage came from her side. The appellant, by complying with her wishes can by no stretch of imagination be said to have taken her out of the keeping of her lawful guardian. After the registration of the agreement both the appellant and Savitri lived as man and wife and visited different places….
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> …...The fact of her accompanying the appellant all along is quite consistent with Savitri's own desire to be the wife of the appellant in which the desire of accompanying him wherever he went was course implicit. In these circumstances we find nothing from which an inference could be drawn that the appellant had been guilty of taking away Savitri out of the keeping of her father. She willingly accompanied him and the law did not cast upon him the duty of taking her back to her father's house or even of telling her not to accompany him. She was not a child of tender years who was unable to think for herself but, as

already stated, was on the verge of attaining majority and was capable of knowing what was good and what was bad for her. She was no uneducated or unsophisticated village girl but a senior college student who had probably all her life lived in a modern city and was thus far more capable of thinking for herself and acting on her own than perhaps an unlettered girl hailing from a rural area.....

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9. It must, however, be borne in mind that there is a distinction between "taking" and allowing a minor to accompany a person. The two expressions are not synonymous though we would like to guard ourselves from laying down that in no conceivable circumstances can the two be regarded as meaning the same thing for the purposes of Section 361 of the Indian Penal Code. We would limit ourselves to a case like the present where the minor alleged to have been taken by the accused person left her father's protection knowing and having capacity to know the full import of what she was doing voluntarily joins the accused person. In such a case we do not think that the accused can be said to have taken her away from the keeping of her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian.

10. It would, however, be sufficient if the prosecution establishes that though immediately prior to the minor leaving the father's protection no active part was played by the accused, he had at some earlier stage solicited or persuaded the minor to do so. In our opinion, if evidence to

establish one of those things is lacking it would not be legitimate to infer that the accused is guilty of taking the minor out of the keeping of the lawful guardian merely because after she has actually left her guardian's house or a house where her guardian had kept her, joined the accused and the accused helped her in her design not to return to her guardian's house by taking her along with him from place to place. No doubt, the part played by the accused could be regarded as facilitating the fulfilment of the intention of the girl. That part, in our opinion, falls short of an inducement to the minor to slip out of the keeping of her lawful guardian and is, therefore, not tantamount to "taking".

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19…..After pointing out that there is an essential distinction between the words "taking" and "enticing" it was no doubt observed that the mental attitude of the minor is not of relevance in the case of taking and that the word "take" means to cause to go, to escort or to get into possession. But these observations have to be understood in the context of the facts found in that case. For, it had been found that the minor girl whom the accused was charged with having kidnapped had been persuaded by the accused when she had gone out of her house for answering the call of nature, to go along with him and was taken by him to another village and kept in his uncle's house until she was restored back to her father by the uncle later. Thus, here there was an element of persuasion by the accused person which brought about the willingness of the girl and this makes all the difference. In our opinion, therefore, neither of these decisions is of assistance to the State."

In ***Raja Ram***, Hon'ble Supreme Court observed:-

"9….The fact that the prosecutrix was easily persuaded to go with Raja Ram would not prevent him from being guilty of the offence of kidnapping her. Her consent or willingness to accompany Raja Ram would be immaterial and it would be equally so even if the proposal to go with Raja Ram had emanated from her. There is no doubt a distinction between taking and allowing a minor to accompany a person. But the present is not a case of the prosecutrix herself leaving her father's house without any inducement by Ra ja Ram who merely allowed her to accompany him."

In ***Thakorlal D. Vadgama***, Hon'ble Supreme Court observed:-

"9…..The two words "takes" and "entices", as used in Section 361 IPC are in our opinion, intended to be read together so that each takes to some extent its colour and content from the other. The statutory language suggests that if the minor leaves her parental home completely uninfluenced by any promise, offer or inducement emanating from the guilty party, then the latter cannot be considered to have committed the offence as defined in Section 361 IPC. But if the guilty party has laid a foundation by inducement, allurement or threat, etc. and if this can be considered to have influenced the minor or weighed with her in leaving her guardian's custody or keeping and going to the guilty party, then prima facie it would be difficult for him to plead innocence on the ground that the minor had voluntarily come to him. If he had at an earlier stage solicited or induced her in any manner to leave her father's protection, by conveying or indicating or

encouraging suggestion that he would give her shelter, then the mere circumstance that his act was not the immediate cause of her leaving her parental home or guardian's custody would constitute no valid defence and would not absolve him. The question truely falls for determination on the facts and circumstances of each case. In the case before us, we cannot ignore the circumstances in which the appellant and Mohini came close to each other and the manner in which he is stated to have given her presents and tried to be intimate with her. The letters written by her to the appellant mainly in November 1966 (Exhibit P-20) and in December 1966 (Exhibit P-16) and also the letter written by Mohini's mother to the appellant in September 1966 (Exhibit P-27) furnish very important and essential background in which the culminating incident of January 16 and 17, 1967 has to be examined. These letters were taken into consideration by the High Court and in our opinion rightly. The suspicion entertained by Mohini's mother is also in our opinion, relevant in considering the truth of the story as narrated by the prosecutrix. In fact, this letter indicates how the mother of the girl belonging to a comparatively poorer family felt when confronted with a rich man's dishonourable behaviour towards her young, impressionable immature daughter; a man who also suggested to render financial help to her husband in time of need. These circumstances, among others, show that the main substratum of the story as revealed by Mohini in her evidence, is probable and trustworthy and it admits of no reasonable doubt as to its truthfulness. We have, therefore, no hesitation in holding that the conclusions of the two courts below with respect to the offence under Section 366 IPC are unexceptionable. There is absolutely no ground for interference under Article 136 of the Constitution."

Applying the above principles in the present case, it cannot be held that the victim had voluntarily gone with the accused of her own. At best, inference can be that she did not resist her being taken away. Case of the accused is that the accused had denied the occurrence altogether and has not taken the plea that it was the victim who voluntarily went away. Only contention raised is that from the case of the prosecution, an inference can be drawn that the victim cannot resist the acts of the accused.

In these circumstances, the offence under Sections 363/366 stands fully established.

As regards the offence of Section 376 IPC, the fact that the victim was above the age of 16 years, is significant. Her having lived with the accused for five days when she had opportunity to escape, may create a doubt whether she was raped against her wishes. It is well settled that statement of the victim is very significant and even in absence of any injury on the person of the prosecutrix, the offence can be held to have been proved if she was under the threat. No girl will normally allege such an offence falsely. She is not an accomplice to the crime, but victim of another person's lust, as held by the Hon'ble Supreme Court in ***State of Punjab v. Gurmit Singh*** AIR 1996 SC 1393. Absence of consent can be inferred from the statement of the prosecutrix under Section 114-A of the Evidence Act. However, as observed by the Hon'ble Supreme Court in ***Shyam and another*** **v.** ***State of Maharashtra*** AIR 1995 SC 2169, inference of

her being a consenting party could be drawn from the fact of the victim not protesting, in a given case.

The question is of drawing an inference from the evidence of an individual case.

Having regard to the facts of the present case, the act of the victim of going with the accused, cannot be held to be voluntary, but there can be two views on the question of victim having consented to sexual intercourse. Even though the Court has to be sensitive about the security of the victim against any sexual offence, if there are two views on the evidence led, the accused may be entitled to benefit of doubt. In the present case, the accused is given the benefit of doubt with regard to offence under Section 376 IPC.

Reference may also be made to the judgments cited by learned counsel for the appellant.

The judgment of the Hon'ble Supreme Court in ***S. Varadarajan's*** case (*supra)* has already been discussed.

As regards judgment of this Court in ***Rajesh*** *(supra),* the observation that consent of minor is enough against an offence under Section 366 IPC is not in accordance with the law laid down by the Hon'ble Supreme Court referred to above. Same is the position with regard to judgment of this Court in ***Narender***'s (supra)

In view of direct judgments of the Hon'ble Supreme Court holding that consent of the minor is no defence for offence under Sections 363/366 IPC, the conviction of the appellant under Sections 363 and 366 is not liable to be interfered with and is upheld. However,

substantive sentence under Section 366 IPC is reduced to RI for 4 years.

As regards the offence under Section 376 IPC, the accused is given benefit of doubt, as the consent of the victim will be relevant for the said offence, she being above the age of 16 years.

Conviction and sentence under Section 376 IPC are set-aside.

The appeal is partly allowed.

April 03, 2007 (**ADARSH KUMAR GOEL)**
ashwani **JUDGE**